No. 88-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington State Department of Social & Health Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit organization located in

Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. NLADA has a membership of 2,300 legal aid and defender offices employing approximately 25,000 professionals and, in addition, over 1,000 individual members. The membership of NLADA includes most public defender offices and legal service agencies in the nation, as well as assigned counsel plans and individual practitioners.

Accordingly, NLADA is vitally interested in ensuring that indigent habeas corpus petitioners will continue to have access to the federal courts to challenge unconstitutionally obtained convictions, including convictions used to enhance later sentences. Counsel for

each of the parties to this case has consented in writing to the filing of an amicus curiae brief on behalf of the NLADA.

STATEMENT

Petitioner, Mark Edwin Cook, was convicted of armed robbery in 1958. In 1976, Mr. Cook was convicted of Washington state crimes. In imposing sentence in 1978, the Washington trial court lengthened Mr. Cook's minimum sentence by two and one-half years because of his prior convictions.

In his petition for habeas corpus, Mr. Cook alleged that his 1985 conviction was invalid because he never received a competency hearing which had been ordered by the trial court. He claims that a determination that his 1958 conviction was unconstitutional would result in a

reduction of his 1978 sentence.

The district court found no jurisdiction to consider the challenge to the 1958 conviction. The United States Court of Appeals for the Ninth Circuit reversed. This Court granted certiorari to address whether a district court has subject matter jurisdiction over a § 2254 challenge to a prior fully-served conviction used to enhance a subsequent unrelated state sentence.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently held that federal district courts have habeas corpus jurisdiction to review a prisoner's constitutional challenge to a fully served conviction which lengthened the sentence currently being served. See United States v. Tucker, 404 U.S. 443, 448 (1972); United States v. Morgan, 346

U.S. 502, 512 (1954). Mr. Cook's petition presents a compelling case for habeas corpus relief because the minimum duration of his 1978 Washington sentence was increased by several years as a result of his 1958 conviction. Cook v. Maleng, 847 F.2d 616, 617 (9th Cir.), cert. granted, 109 S. Ct. 363 (1988). The increase in the minimum term on the 1978 sentence requires that the federal court review his challenge to the 1958 conviction.

The instant petition falls squarely within the traditional scope of habeas corpus jurisdiction. The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. 28 U.S.C. § 2241(c), 28 U.S.C. § 2254. The custody requirement of the statute is

designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Hensley v. Municipal Court, 411 U.S. 345, 352 (1973). In the present case, the additional time Mr. Cook will spend in prison as a result of the 1958 conviction is a severe restraint on his individual liberty.

Both the language of the statute and the common law history of the writ reveal that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

In the present case, this Court need not expand the limits of the "in custody"

requirement. See Hensley v. Municipal Court, 411 U.S. 345 (1973) (custody found for petitioners released on bail); Carafas v. LaValee, 391 U.S. 234 (1968) (custody found for petitioners released during habeas review); Jones v. Cunningham, 371 U.S. 236 (1963) (custody found for petitioners serving a term of parole). Mr. Cook's petition presents a clear-cut case of custody resulting from an earlier sentence which, if invalid, prolongs illegally his stay in prison. See United States v. Tucker, 404 U.S. 443, 448 (1972). See also Burgett v. Texas, 389 U.S. 109, 115 (1967).

Because the use of a prior, unconstitutional sentence to enhance a subsequent sentence revives the earlier violation of the accused's constitutional rights, the federal courts should retain

habeas corpus jurisdiction to review such enhanced sentences.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY REVERSED THE TRIAL COURT'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PETITIONER WAS IN CUSTODY WHEN HE FILED HIS PETITION FOR HABEAS CORPUS.

The minimum duration of Mr. Cook's 1978 Washington sentence was increased by several years because of his 1958 conviction. As a result, the federal district court has jurisdiction over his challenge to the constitutionality of his 1958 conviction. If the prior conviction was obtained unconstitutionally, then the sentence imposed for the 1978 conviction was improperly long, an error clearly appropriate for habeas corpus relief. See United States v. Tucker, 404 U.S. 443, 448 (1972); see also Burgett v. Texas, 389 U.S. 109, 115 (1967). As the

United States Court of Appeals for the Ninth Circuit recognized in this case, habeas corpus jurisdiction extends to only a limited class of fully served prior convictions:

> [w]e do not hold that jurisdiction afforded by section 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the state uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified.

Cook v. Maleng, 847 F.2d 616, 619 (9th Cir. 1988), citing Hensley v. Municipal Court, 411 U.S. 345, 350-351 (1973). Amicus curiae asserts that habeas corpus petitioners are entitled to relief when a

fully-served sentence resulting from an unconstitutionally obtained conviction causes a separate conviction or sentence to be enhanced. Recognizing this right serves the core purpose of habeas corpus: preventing illegal detention of an individual.

In Peyton v. Rowe, 391 U.S. 54 (1968), this Court held that a prisoner may attack on habeas corpus the second of two consecutive sentences while still serving the first. The Peyton Court indicated that the federal habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release." Id. 391 U.S. at 66. Such relief is required not only when a prisoner seeks immediate discharge from confinement but also when he seeks to diminish the length of that sentence.

See Preiser v. Rodriguez, 411 U.S. 475, 483 (1973) (habeas corpus and not § 1983 is the sole federal remedy to challenge duration of imprisonment when relief sought is speedier release).

II. THIS COURT SHOULD CONTINUE TO LIMIT THE COLLATERAL USE OF INVALID PRIOR CONVICTIONS TO ENHANCE PUNISHMENT FOR A SUBSEQUENT OFFENSE.

This Court has held consistently that an invalid prior conviction may not be used to enhance a subsequent conviction. There is no persuasive reason to abandon this rule. In Burgett v. Texas, 389 U.S. 109 (1967), this Court held that a prior felony conviction, invalid because of a violation of the right to counsel as enunciated in Gideon v. Wainwright, 372 U.S. 335 (1963), could not be used to support guilt under an enhancement statute. The Burgett Court concluded that the use of an unconstitutional prior

conviction "either to support guilt or enhance punishment" revives the violation of the accused's constitutional rights. Burgett, 369 U.S. at 115. See also Lewis v. United States, 445 U.S. 55, 60 (1980).

In United States v. Tucker, 404 U.S. 443 (1972), this Court held that uncounseled prior convictions could not be used as factors in sentencing for a subsequent offense. In Tucker, the habeas corpus petitioner was sentenced in federal court on the basis of two fully served convictions regarding which he had been denied the right to counsel. This Court stated that a sentence must not be based on "misinformation of a constitutional magnitude." Tucker, 404 U.S. at 448. Accord Jones v. Cunningham, 371 U.S. 236, 243 (1963). See also Townsend v. Burke, 334 U.S. 736 (1948)

(prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue). Like the sentence in Tucker, Mr. Cook's current sentence was in fact enhanced by a prior, fully-served conviction.

The requirement of both Burgett and Tucker is that a habeas corpus petitioner, in custody as a result of an enhanced sentence, must not have his or her sentences determined on the basis of prior unconstitutionally obtained conviction. Because the use of a prior unconstitutional sentence to enhance a subsequent sentence revives the earlier violation of the accused's constitutional rights, the federal courts should retain habeas corpus jurisdiction to review such enhanced sentences. See Burgett v. Texas, 389 U.S. 109, 115 (1967).

In a case nearly identical to the case at bar, this Court granted a writ of error coram nobis to a petitioner sentenced as a recidivist on the basis of a fifteen-year-old fully served conviction. United States v. Morgan, 346 U.S. 502 (1954). The Court stated:

> Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.

Morgan, 346 U.S. at 512-13.

In Morgan, the district court had jurisdiction because the prior sentence enhanced the later conviction. Id. at 503-04. The case at bar presents a similar case for jurisdiction.

III. THIS COURT SHOULD FOLLOW THE HOLDINGS OF THE VAST MAJORITY OF CIRCUITS WHICH ALLOW HABEAS CORPUS JURISDICTION TO CHALLENGE A PRIOR FULLY SERVED SENTENCE USED TO ENHANCE A LATER CONVICTION.

The vast majority of appellate courts which have considered the enhancement issue have held that there is habeas corpus jurisdiction for prisoners to attack a prior fully-served conviction used to increase the severity of charges or sentences. Aziz v. Leferve, 830 F.2d 184 (11th Cir. 1987); Young v. Lynaugh, 821 F.2d 1133 (5th Cir.), cert. denied, 108 S. Ct. 503 (1987); Anderson v. Smith, 751 F.2d 96 (2nd Cir. 1984); Thacker v. Peyton, 419 F.2d 1377 (4th Cir. 1969). See also Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979); Lyons v. Brierly, 435 F.2d 1214 (3d Cir. 1970).

In a decision involving the same issue as the instant case, the Fifth Circuit held that a petitioner is "in custody" to attack a prior fully-served offense used to enhance a later sentence. In Young v. Lynaugh, 821 F.2d 1133 (5th Cir. 1987), the petitioner challenged a 1963 conviction allegedly involving an improper and uncounseled guilty plea which resulted in his receiving a life sentence in 1978 as a habitual offender. The Court of Appeals stated that "in custody" for jurisdiction does not necessarily mean "in custody for the offense being attacked." Young, 821 F.2d at 1137. The Young court held that a federal district court has jurisdiction when there is "a positive and demonstrable nexus between a petitioner's current custody and the allegedly

unconstitutional conviction." Id. See Craig v. Beto, 458 F.2d 1131, 1134 (5th Cir. 1972) (petitioner in custody if serving enhanced sentence at time of filing petition); Jackson v. Louisiana, 452 F.2d 451, 452 (5th Cir. 1971) (same); Cappetta v. Wainwright, 406 F.2d 1238, 1239 (5th Cir.), cert. denied, 396 U.S. 846 (1969) (petitioner in custody if prior conviction delayed start of a later conviction).

In Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984), the Court of Appeals found jurisdiction for a challenge to a fully-served sentence for possession of weapons, alleged to have been based on a Fifth Amendment violation, which could have lengthened a contemporaneous felony murder sentence. The habeas corpus petition was filed more than four years

after the completion of the sentence for illegal possession of weapons. Anderson, 751 F.2d at 100. See also United States ex rel. Durocher v. LaVallee, 330 F.2d 303, 306 (2d Cir.) (en banc), cert. denied, 377 U.S. 998 (1964) (petitioner confined as recidivist, whose sentence might be reduced if successful in attacking fully-served convictions is in custody); Easterling v. Wilkins, 303 F.2d 883, 884 (2nd Cir. 1962) (same).

In Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979), the Seventh Circuit held that a prisoner confined pursuant to one conviction may attack the validity of a separate, prior conviction if it prolongs the period of his confinement. In Harrison, an invalid 1966 conviction postponed the beginning of petitioner's 1971 sentence. 597 F.2d at 116. The

Harrison court stated that the invalid sentence would unlawfully prolong the restraint on petitioner's liberty, so that he was effectively "in custody" on the earlier conviction. Id. at 116-17. Thus, Harrison was found to be "in custody" for purposes of federal habeas corpus jurisdiction. Id. at 117. Accord Lyons v. Brierly, 435 F.2d 1214, 1215-16 (3d Cir. 1970) (petitioner in custody to challenge validity of fully-served sentence which petitioner had been required to complete and which thereby postponed commencement of a later sentence).

In the present case, Mr. Cook does not seek any expansion of the meaning of the "in custody" jurisdictional requirement of 28 U.S.C. § 2254 for habeas corpus relief. As the Third Circuit indicated

in finding jurisdiction in a similar case:

> we do not deal with the outer limits which the "in custody" requirement places on jurisdiction to entertain writs of habeas corpus. Here the earlier sentence which is under attack directly and indubitably affects the duration of petitioner's confinement under the second sentences. This is a clear cut case of custody resulting from an earlier sentence which if invalid prolongs illegally petitioner's stay in prison.

Lyons, 435 F.2d at 1215-16. Accord United States ex rel. Di Rienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970).

The cases cited by the State of Washington in support of a contrary rule are not persuasive. The court in Cotton v. Mabry, 674 F.2d 701 (8th Cir. 1982), cert. denied, 459 U.S. 1015 (1982), ruled that a petitioner was not in custody to challenge a prior conviction even if that conviction prolonged two present sentences. The Cotton court erroneously

relied on Harvey v. South Dakota, 526 F.2d 840, 841 (8th Cir. 1975), cert. denied, 426 U.S. 911 (1976), for the proposition that "[t]he collateral consequences of conviction only kept the case from becoming moot; they did not suffice to give the federal courts jurisdiction." Cotton, 674 F.2d at 703. In fact, the petitioner in Harvey merely challenged a fully served sentence, not one used to enhance a later sentence. 526 F.2d at 841. Thus the Harvey petitioner was not in custody and this Court's decision in Carafas v. LaValee, 391 U.S. 234 (1968), was fully dispositive of the issue. Carafas held that a prisoner is in custody if the petition was filed before his or her release from prison or parole. 391 U.S. at 237-38. Because the petitioner in

Harvey was no longer in custody when he filed his habeas corpus petition, the district court lacked jurisdiction over the petition.

Unlike the situation in Harvey, the restraints on liberty in a case involving enhancement are both severe and immediate because the duration of present custody continues to be determined by the prior conviction. See Hensley v. Municipal Court, 411 U.S. 345, 352 (1973).

The state cites Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), as support for its proposition that custody is not reestablished by the use of a fully-served conviction to enhance a later sentence. Harris, however, is concerned with venue and not jurisdiction. The Harris court held that a federal district court in one state may not consider a

habeas petition challenging a prior fully-served state conviction in that state when the petitioner is imprisoned in another state on an unrelated charge. 683 F.2d at 98. Both the decisions on which Harris relied concerned the proper venue to challenge a fully-served out-of-state conviction used to enhance another state's sentence. See Hanson v. Circuit Court, 591 F.2d 404 (7th Cir.), cert. denied 444 U.S. 907 (1979); Noll v. Nebraska, 537 F.2d 967 (8th Cir. 1976). Furthermore, the Fourth Circuit has held consistently that a prisoner is in custody for purposes of habeas corpus jurisdiction to attack a fully served sentence used to enhance a subsequent conviction. See Thacker v. Peyton, 419 F.2d 1377 (4th Cir. 1969); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968);

Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966). See also Thacker v. Garrison, 527 F.2d 1006 (4th Cir. 1975).

Finally, the State relies on Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985), which is not an enhancement case at all but concerns collateral consequences in the parole setting.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit, holding that the custody requirement for habeas corpus jurisdiction was satisfied when a petitioner's prior conviction, although expired, was used to enhance his current sentence, should be affirmed.

Respectfully submitted,

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